

IN THE HIGH COURT OF FIJI AT SUVA

IN THE CENTRAL DIVISION

CIVIL JURISDICTION

Civil Action No. HBC 66 of 2024

BETWEEN: **HUA ZHU CONSTRUCTION PTE LIMITED**

FIRST PLAINTIFF/RESPONDENT

AND: **ZHENG ZHUI**

SECOND PLAINTIFF/RESPONDENT

AND: **ZHONG LIN CONSTRUCTION PTE LIMITED**

DEFENDANT/APPLICANT

Date of Hearing : **19 August 2024**

For the Plaintiff/Respondent : **Mr Singh, N.**

For all the Defendants/Applicant : **Mr Pal A.**

Date of Decision : **12 November 2024**

Before : **Waqainabete - Levaci, S.L.T.T, Puisne Judge**

R U L I N G

(APPLICATION FOR STRIKING OUT OF WRIT)

BACKGROUND

1. The two Plaintiffs and Defendant entered into a business venture together known as Rock-Hard-Rock Mines and Quarries Pte Limited.
2. The Plaintiff contracted the Defendant to build a three storey structure on the property known as State Lease No. 21157 on Lot 3 on SO 7531 described as Lot 23 Nuku Road, Fantasy Island, Nadi (registered to the Defendant) and to transfer the property on completion of works.
3. The Second Plaintiff had financed the acquisition and construction of the property amounting to \$1,334,738.51 (One Million Three Hundred and Thirty Fourth Thousand Seven Hundred and Thirty Eight Dollars Fifty One Cents).
4. The Defendant failed to transfer the property and the First Plaintiff placed a caveat on the property.
5. The Plaintiff is seeking for specific performance i.e. transfer of property, enforcement by way of orders for the Chief Registrar to sign documentations for transfer, all legal costs and expenses, special and general damages.

GROUND FOR STRIKING OUT

6. The Defendant filed a Summons seeking the following Orders:
 - (i) Action be stayed until the determination of the application;
 - (ii) The action be struck out and dismissed;
 - (iii) Costs be awarded in favour of the Applicant/Defendant.
7. The Grounds that the Defendant relies upon to strike out is as follows:
 - (i) The Plaintiffs have failed to obtain the consent of the Director of Lands prior to commencement of proceedings as required under section 13 of the State Lands Act. No consent is pleaded or provided.

- (ii) The Plaintiff's claim is barred pursuant to section 59 of the Indemnity, Guarantee and Bailment Act. The Plaintiffs in paragraphs 11 and 28 plead that the purported agreement is an agreement for the transfer of land.

LAW ON STRIKING OUT

8. Striking out proceedings is a discretionary power exercised by the Master of Judge by virtue of Order 18 Rule 18 of the High Court Rules or in accordance with the Courts inherent jurisdiction.

9. Order 18 Rule 18 (1) of the High Court Rules reads :

“(1) The Court at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:

- (a) It discloses no reasonable cause of action or defence, as the case may be; or
- (b) It is scandalous, frivolous or vexatious; or
- (c) It may prejudice, embarrass or delay the fair trial of the action;
- (d) It is otherwise an abuse of the process of the court;

And may the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application in paragraph (1) (a).”

10. In the Supreme Court Practice (1988, Sweet and Maxwell, London, Vol 1) page 314 para 18/19/3 to 18/19/4:

“It is only in plain and obvious cases that recourse should be had to the summary process under this rule per Lindley MR in Hubbuck -v- Wilkinson [1899] 1 Q.B 86, at page 91 (Mayor, etc, of the City of London -v- Horner (1914) 111 L.T 512 (1952) AC 345, H.L. The summary procedure under this rule can only be adopted when it can

be clearly seen that a claim or answer is on the face of it "obviously unsustainable' (Att.-Gen of Ducky of Lancaster -v- L.& N.W.Ry. Co. [1892] 3. Ch. 274, C.A) The summary remedy under this rule is only to be implied in plain and obvious cases when the action is one which cannot succeed or is some way an abuse of the process or the case unarguable (se per Dunkkwerts and Salmon L.JJ.

Where an application to strike out pleadings involves a prolonged and serious argument, the Court should, as a rule decline to proceed with the argument unless it only harbours doubts about the soundness of the pleadings but, in addition, is satisfied that striking out would obviate the necessity for a trial and therefore where the Court is satisfied, even after substantial argument both at first instance and on appeal, the defence does not disclose a reasonable ground of defence, it will order it to be struck out (Williams & Humbert -v- W & H Trademarks (Jersey) Ltd [1986] A.C 368 [1986] 1 ALLER 129; H.L affirming [1985] ALL ER .

11. Counsel for the Defendant/Applicant had referred to the Halsbury Laws of England which discussed further on the inherent jurisdiction of the Court to strike out matters.
12. In Halsbury's Laws of England (Buttersworth, London, 1982) Vol 37 in page 323 para 435 states:

435. Striking out under the Courts inherent jurisdiction. In addition to its powers under the Rules of the Supreme Court, the court has an inherent jurisdiction to strikeout pleadings and other documents which are shown to be frivolous, vexatious or scandalous and to stay or dismiss an action or to strikeout a defence which is an abuse of the process of the court. So under its inherent jurisdiction the court may strike out the whole or part of the indorsement on a writ or stay or dismiss an action which is frivolous, vexatious or an abuse of court process or must fail or which the plaintiff cannot prove and which is without a solid basis, or which seeks to raise anew a question already decided by a court of competent jurisdiction, even though res judicata may not strictly be an answer to the claim. Equally, the court may strike out a sham defence as an abuse of process."

PARTIES SUBMISSIONS

13. The parties had submitted both oral and written submissions.
14. The Defendant/Applicant submitted that the grounds for seeking striking out are twofold. The first ground is that the claim is barred pursuant to section 59 of the indemnity, Bailment and Guarantee Act (referred to as the 'Act') which requires that all agreements dealing with lands be in writing. Reference was made to the cases of Jeana Darrah -v- Mongston & Others HBC 283 of 2016 and Chand -v- Kumar HBC 157.2010.
15. The Agreement between the parties, as pleaded, is an oral agreement which is contrary to the provisions of section 59 of the Act.
16. The land to be transferred is a State Lease which is a protected leases, consent should be obtained by the Director of Lands prior to commencing proceedings according to the State Lands (Amendment) Act 2023.
17. In response the Plaintiff/Respondent argues that consent is not required for these proceedings as the Defendant/Applicant had already filed an eviction proceedings in HBC 349 of 2023. In that case the Court held that the Plaintiff/Respondent had an equitable interest in the property. There was no consent was required as the Defendant/Applicant did not object to the application.
18. In Begg -v- Khan [2018] FJHC 47; HBA 24.2017 (31 January 2018) it was held that a consent by the Director of Lands is not required to commence legal proceedings. The Lessee is required to obtain consent and not the Plaintiff/Respondent.
19. In response to the argument that the Claim is contrary to section 59 of the Indemnity, Bailment and Guarantee Act, the Plaintiff/Respondent argued that there was an agreement entered into between the parties after it was prepared and sent by their Counsel.

ANALYSIS

Section 59 of the Indemnity, Guarantee and Bailment Act

20. Section 59 of the Indemnity, Guarantee and Bailment Act provides as follows:

Promises or agreements by parol

*59. No action shall be brought-

(d) upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them; or

unless the agreement upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged there or some other person thereunto by him lawfully authorised.

*inserted by 22 of 1918.

21. Under section 59, there is a requirement in law for an action to survive if the agreement is in writing.

22. In Itaukei Land Trust Board -v- Hughes [2014] FJCA 191; ABU 0053;2012 (5 December 2014) Guneratne JA, Wati JA and Mutunayagam JA held that the relief sort for building a residential premises with implied consent on the basis that a lease would be renewed was an action for which reliefs could only be got in equity and not specific performance. On that basis the Court held that:

[58] It is borne in mind that, statutory requirements requiring a memorandum of an agreement relate to the mode of proving the agreement and not the existence of an agreement (see: Lochefoucauld -v- Boustead [1986] UKLawRpCh 180; [1897] 1 Ch. 196, CA, which dealt with the requirement of a memorandum of a contract for the sale of land.

[59] I am conscious of the fact, that I have adapted a benevolent construction of section 59 (d) of the Indemnity, Guarantee and Bailment Act but feel fortified that the approach on the principle, that status affecting property rights like penal statutes must be construed to favour an affected party."

23. In this instance, the reliefs sort are specific performance and damages.
24. Therefore in any claim, there is a requirement that there be a memorandum in writing or an agreement in writing in order to then prove that an agreement existed for the purposes of the relief sort.
25. An oral agreement is thus unenforceable but not void.
26. I agree with my brother Judge Amaratunga who said in Jay -v- Prasad [2024] FJHC 605; HBC 18.2023 (3 October 2024):

“[81] Section 59 of Indemnity Guarantee and Bailment Act 1881 was not considered as a bar to equity in Fiji. There were no statutory interventions similar to UK to application of equity to grant relief to parties such as Plaintiff. Despite statutory interventions in UK to intervene in such instance the UK courts have not allowed statute to be used an instrument of fraud. Ratio from the above UK decisions are clear indication as to paramount importance of equity to intervene when there is unconscionable conduct such as the conduct of Defendants. So in my mind Section 59 of Indemnity Guarantee and Bailment Act 1881 is not a bar to equitable relief of Plaintiff.

[82] Plaintiff was assured by both Defendants that he will be paid the cost of construction of ‘farm house’ when he leaves it. Plaintiff had spent around \$30,000 and to build wooden house and had lived in the said property for nearly ten months and then he was evicted. There is a creation of promissory estoppel and Plaintiff needs to be compensated for his expenditure.

[83] Alternatively, Plaintiff’s claim on equity can also base on unjust enrichment which is not a proprietary remedy. This is a well-recognized common law remedy. Farm House had added value to land provided for agriculture. (see Yeoman's Row Management Ltd and another v Cobbe [2008] 4 All ER 713).”

27. In Jay -v- Prasad (Supra), it was held that the reliefs for the construction of a farm house on the disputed land can be pursued on the Law of equity.
28. In this instance, the claim before me is based on an oral agreement for the transfer of property as a result of the construction of a residential premises on the said property.

29. The substantive claim rests upon the cause of action for breach of oral agreement seeking the relief of specific performance.
30. I find there is no cause of action available to the Plaintiffs/Respondent where there is no Agreement entered into and canvassed in their claim.

Section 13 (1) of the State Lands Act

31. The Defendant/Applicant has also argued that the Plaintiff/Respondent failed to plead nor to show that consent had been obtained from the Director of Lands for this action.
32. Nair Transport Company Limited -v- Sarita Devi CA No. ABU 0063 of 2022 also discussed in detail the implications of section 13 of the State Lands (Amendment) Act and held that since the action commenced during the transition provision, section 13 A (1) and (2).
33. Section 13 and Section 13 (1A) of the State Lands (Amendment) Act 2023 states:

Protected Leases

“13- (1) Wherever any lease under this Act there has been inserted the following clauses –

This lease is a protected lease under the provisions of the Crown Land Act (herein after called a protected lease) it shall not be lawful for the lessee thereof to alienate, or deal with the land comprised in the lease or nay part thereof, whether by sale transfer sublease or in any manner whatsoever, nor to mortgage charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except with the suit or the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any Court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease. Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void.

13A (1) Any mortgage, charge, pledge, caveat or lease to be dealt with by any Court of law under section 13 on or after 1 August 2021, on or

after 1 August 2021 and before the commencement of the States Land (Amendment) Act 2023 is deemed to have acquired the required consent in accordance with section 13.

(2) Any application received for any mortgage charge, pledge, caveat or lease to be dealt with by any court of law or under the process of any court of law under section 13 on or after 1 August 2021 and before the commencement of the State Lands (Amendment) Act 2023 for which the decision has not been made must acquire the required consent in accordance with section 13”

34. The Court notes that the Writ of Summons was filed on 12 March 2024, hence section 13 (1) of the State Lands Act applied.
35. Thus in accordance with the law, where no consent was obtained prior to commencement of this action, the legal proceeding is illegal.
36. I concur with my brother Ajmeer J who resounds decisions of similar precedent cases in the case of Mohammed -v- Khan [2015] FJHC 728; HBC 67.2014 (2 October 2015) :

“[33] The applicant proposes to argue, if leave is granted, that section 59 (d) of the Indemnity, Guarantee and Bailment Act does not apply to and does not affect the equitable claim of the plaintiff. I am of opinion that the applicant cannot succeed in that argument, for the agreement allegedly entered orally between the parties is contaminated with illegality. So, the applicant cannot claim even an equitable relief (See Chalmers v Pardoe [1963] 3 All ER 552 and Singh v Sumintra [1970] 16 FLR 165 (13 November 1970)”
37. In this instance, even equity cannot succeed where the cause of action relies upon an oral agreement which is contaminated with illegality by failing to obtain the consent of the Director of Lands.
38. Having considered the preparation and submissions by parties, costs will be awarded to the Defendant/Applicant as summarily assessed.

PART D: ORDERS

39. The Court Orders as follows:

- (a) **Writ of Summons and Statement of Claim be struck out;**
- (b) **Costs summarily assessed to the Defendant/Applicant to be paid by the Plaintiff/Respondent summarily assessed at \$1000 within 90 days.**



A handwritten signature in black ink, consisting of a large, stylized loop at the top and a horizontal line extending to the right.

Justice Senileba Waqainabete-Levaci

Puisne Judge

12 November 2024